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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. KEITH OMAR THURNAN, Defendant and Appellant.	D072678 (Super. Ct. No. SCD271092)

APPEAL from a judgment of the Superior Court of San Diego County, Amalia Meza, Judge. Affirmed and remanded with directions.

David L. Annicchiarico, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler and Julie L. Garland, Assistant Attorneys General, Arlene A. Sevidal, Andrew Mestman, Elizabeth M. Kuchar, Deputy Attorneys General, for the Plaintiff and Respondent.

A jury convicted Keith Omar Thurnan of assault with a deadly weapon (Pen. Code,[1] § 245, subd. (a)(1); count 1), simple assault, a lesser included offense of assault by means likely to produce great bodily injury (§ 240; count 2), and making a criminal threat (§ 422; count 3). It found true that in committing counts 1 and 3, Thurnan personally used a dangerous and deadly weapon, specifically, a rock. (§ 1192.7, subd. (c)(23).)

In separate proceedings, the court found true that Thurnan had suffered a probation denial prior conviction (§ 1203, subd. (e)(4)), two prison prior convictions (§§ 667.5, subd. (b), 668), two serious felony prior convictions (§§ 667, subd. (a)(1), 668, 1192.7, subd. (c)) and a strike prior conviction (§§ 667, subds. (b)-(i), 668, 1170.12). The court sentenced him to nine years in prison consisting of four years (double the two-year low term) on count 1 plus five years on the serious felony prior convictions.

Thurnan contends: (1) he is entitled to a new trial on the criminal threat conviction because the court violated his constitutional rights by failing to instruct the jury on its own motion about the lesser included offense of attempted criminal threat; (2) insufficient evidence showed that the rock he hurled at his victim was a deadly weapon, requiring his count 1 conviction for assault with a deadly weapon be modified to simple assault; (3) the court erroneously instructed the jury that a rock is an inherently deadly or dangerous weapon, therefore, his count 1 conviction and the enhancement must be reversed; and (4) he is entitled to 20 additional days of presentence credit. In a

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1 Undesignated statutory references are to the Penal Code.

supplemental brief, Thurnan contends we should remand the matter for the trial court to exercise its discretion regarding whether to strike the five-year serious felony enhancement under Senate Bill No. 1393 (S.B. 1393), which went into effect during the pendency of this appeal. We affirm the judgment but remand the matter for the trial court to recalculate Thurnan's custody credits and exercise its sentencing discretion under S.B. 1393.

FACTUAL AND PROCEDURAL BACKGROUND

C.T. testified that on March 8, 2017, around 3:00 p.m., she observed Thurnan, who she barely knew, drinking beers at a park. He was angry and said he was going to kill somebody that day. About two hours later, she saw Thurnan arguing loudly with two women. She stepped between Thurnan and the women to stop the incident. One of the women insulted Thurnan and he shoved C.T. hard with both hands. She fell backwards, hit her head on the ground, and "blacked out" for a few seconds. When she revived, she saw Thurnan was "enraged"; she testified "[i]t was frightening to watch him." C.T. sprayed Thurnan with pepper spray. He "was still in an aggressive mode" at that time. He washed his face and screamed at her, "I'm going to kill you, I'm going to kill you." C.T., who was homeless, said she became "scared to death" because she slept alone at night, and Thurnan knew where she slept. She told him, "If you're going to kill me, go ahead and kill me now then. Everybody's here." Thurnan pushed over a shopping cart he thought was C.T.'s and screamed that he was going to kill her. Although she was "very scared," C.T. decided "that's not going to stop me from speaking, you know. You're telling me you're going to kill me. Then do it now if you're going to do it. If you are

going to do it, don't wait 'til I go to sleep. Don't do that to me 'cause [*sic*] that's just—I'm not going to carry that fear all night long with that."

Afterwards, as Thurnan and C.T. walked parallel to each other, he forcefully threw tangerines that hit her chest. Thurnan crossed the street and pelted C.T. with rocks while threatening to kill her. C.T. raised her hand to block the rocks but one hit her arm, which started bleeding and became swollen. She ran after Thurnan and showed him her hand. He apologized to C.T., who accepted it, telling him he must wait for the police, who arrived immediately. After police arrived, C.T. was treated by an ambulance medic, but although her arm hurt badly, she refused to go to the hospital. Two days later, C.T. went to the emergency room because the swelling in her arm had increased.

At trial, the prosecutor asked C.T. why she followed Thurnan considering she was afraid of him. C.T. replied that having been a victim of domestic violence, she had "learned that you . . . take their threats at that moment seriously. You may have all the fear in your heart and your soul, but you don't let that person walk away with that threat left over your head. I can't—I don't live like that no more. I used to live that way. I've been many times beat up because I allowed that person to walk away that threatened me. Today I may have fear, but I won't let you walk away with that threat over my head. I won't do it."

B.S., a percipient witness, testified that on that day Thurnan had threatened some of her friends and other people in the park; therefore, she confronted him and told him not to hit them. B.S. telephoned 911 at about 5:06 p.m. and recounted Thurnan was threatening everyone, saying he was in a gang, and he "pushed this lady down," and the

woman used pepper spray on him. Afterwards, C.T. followed Thurnan, and he threw oranges and rocks hard at C.T., as if he were pitching in a baseball game.

P.P. testified he witnessed the incident. Thurnan was angry and yelling, but C.T. tried to calm him down. P.P. saw C.T. fall down, get up and use pepper spray on Thurnan. P.P. saw Thurnan throw something orange at C.T. P.P. described Thurnan as having "a good strong throw," "just like a baseball player." P.P. called 911 at about 5:18 p.m. and reported the incident, relating some events as they occurred. He described C.T. as "pissed off." At one point, P.P. told the operator, "Where is the squad car at, Goddammit? We need somebody here right away. This is going to get nasty," adding, "Somebody is going to get killed. I know."

Another witness, S.S., testified she saw Thurnan threatening to kill C.T. S.S. said the two were "yelling at the top of their lungs, and it was scary because it looked like [Thurnan] had his chest puffed out, and [C.T.] was kind of like backing away from him." S.S. could see a rock in Thurnan's hand. Thurnan threw the rock at C.T. "full force" and "hard enough to hurt someone." C.T. said, "I am not scared," adding words to the effect, "I'm good with God."

The prosecutor's closing argument focused on the manner in which Thurnan threw the rocks at C.T.: "We had three separate witnesses tell you what they saw. They described to you what [Thurnan's] body was doing. [P.P.] said that it was as if [Thurnan] was playing baseball and he was throwing from second [base]. A full backswing and a follow-through with his body going into it. Again his whole body put into that. [¶] [B.S.] said that it was as if [Thurnan] was playing baseball and he was the pitcher. Again

a full backswing with his arm, full forward—forward throwing and his whole body; and [S.S.], the person who just happened to walk in in this last part of the incident. Full backswing following through and putting his whole body into it." The prosecutor continued: "Rocks are deadly weapons. They can be deadly weapons. We're not talking about pebbles. We're not talking about skipping stones on a pond. We're talking about a rock hurled with enough force, with enough anger to cause this injury." The prosecutor reiterated: "Mr. Thurnan didn't throw a pebble at [C.T.]. He didn't skim a rock at her. He threw a rock so hard, so big that it caused this [injury]. We know that rocks can be deadly weapons if they're big enough and if they're thrown hard enough, it can kill people. It can hurt them. Can cause broken bones and [C.T.] is lucky that this is the most [injury] that she walked away with."

DISCUSION

I.

As to his count 3 criminal threat conviction, Thurnan contends the court violated his federal constitutional rights to jury trial and due process by failing to instruct the jury on its own motion on the lesser included offense of attempted criminal threat, which applies here because his threat assertedly did not cause C.T. to experience sustained fear. He specifically argues that different witnesses testified that C.T. did not leave the scene but instead pursued Thurnan, saying she could take of herself. Moreover, she was not crying and did not seem afraid; and she was tall, muscular, and had a strong personality.

A. *Applicable Law*

"A trial court has a sua sponte duty to instruct the jury on a lesser included uncharged offense if there is substantial evidence that would absolve the defendant from guilt of the greater, but not the lesser, offense." (*People v. Simon* (2016) 1 Cal.5th 98, 132.) "[T]he existence of 'any evidence, no matter how weak' will not justify instructions on a lesser included offense, but such instructions are required whenever evidence that the defendant is guilty only of the lesser offense is 'substantial enough to merit consideration' by the jury." (*People v. Breverman* (1998) 19 Cal.4th 142, 162.) The court's failure to instruct on a lesser included offense is reviewed under a de novo standard of review. (*People v. Waidla* (2000) 22 Cal.4th 690, 733.)

"To prove a violation of section 422,[2] the prosecution must prove ' "(1) that the defendant 'willfully threaten[ed] to commit a crime which will result in death or great bodily injury to another person,' (2) that the defendant made the threat 'with the specific intent that the statement . . . is to be taken as a threat, even if there is no intent of actually carrying it out,' (3) that the threat—which may be 'made verbally, in writing, or by means of an electronic communication device'—was 'on its face and under the circumstances in

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2 Subdivision (a) of section 422 prohibits " 'willfully threaten[ing] to commit a crime which will result in death or great bodily injury to another person, with the specific intent that the statement . . . is to be taken as a threat . . . which, on its face and under the circumstances in which it is made, is so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat, and thereby causes that person reasonably to be in sustained fear for his or her own safety or for his or her immediate family's safety.' " (*People v. Chandler* (2014) 60 Cal.4th 508, 511.)

which it [was] made, . . . so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat,' (4) that the threat actually caused the person threatened 'to be in sustained fear for his or her own safety or for his or her immediate family's safety,' and (5) that the threatened person's fear was 'reasonabl[e]' under the circumstances." ' " (*People v. Culbert* (2013) 218 Cal.App.4th 184, 189, quoting *In re George T.* (2004) 33 Cal.4th 620, 630.)

Sustained fear refers to a state of mind; the word fear "describes the emotion the victim experiences." (*People v. Fierro* (2010) 180 Cal.App.4th 1342, 1349.) It "has a subjective and an objective component." (*In re Ricky T.* (2001) 87 Cal.App.4th 1132, 1140.) "A victim must actually be in sustained fear, and the sustained fear must also be reasonable under the circumstances." (*Ibid.*) This sustained fear element is satisfied where there is evidence that the victim's fear is more than fleeting, momentary or transitory (*People v. Allen* (1995) 33 Cal.App.4th 1149, 1156); it may be found when the evidence shows the victim's fear is not " 'instantly over.' " (*People v. Culbert*, *supra*, 218 Cal.App.4th at p. 191.) No specific time period is required; even one minute of fear can be sustained if a person is confronted with what he believes is a deadly weapon and believes he is about to die. (*People v. Fierro*, at p. 1349 ["we believe that the minute during which [the victim] heard the threat and saw [appellant's] weapon qualifies as 'sustained' under the statute. When one believes he is about to die, a minute is longer than 'momentary, fleeting, or transitory' "].) "[A]ll of the surrounding circumstances

should be taken into account to determine if a threat falls within the proscription of section 422." (*People v. Solis* (2001) 90 Cal.App.4th 1002, 1013.)

"[U]nless the testimony is physically impossible or inherently improbable, testimony of a single witness is sufficient to support a conviction." (*People v. Young* (2005) 34 Cal.4th 1149, 1181; *People v. Leigh* (1985) 168 Cal.App.3d 217, 221 ["the testimony of a single witness is sufficient to uphold a judgment even if it is contradicted by other evidence, inconsistent or false as to other portions"].)

An attempted criminal threat is a lesser included crime of a criminal threat. (*People v. Chandler* (2014) 60 Cal.4th 508, 514; *People v. Toledo* (2001) 26 Cal.4th 221, 226.) " '[I]f a defendant, . . . acting with the requisite intent, makes a sufficient threat that is received and understood by the threatened person, but, for whatever reason, the threat does not actually cause the threatened person to be in sustained fear for his or her safety even though, under the circumstances, that person reasonably could have been placed in such fear, the defendant properly may be found to have committed the offense of attempted criminal threat.' " (*Chandler, supra,* at p. 515.) For example, in *Toledo,* a husband told his wife, "I am going to kill you," and although the victim initially told an investigator that she was scared, the victim later testified that she was not actually frightened. (*Toledo, supra,* at p. 235.) Because the victim's contradictory testimony supplied substantial evidence for a jury to question the subjective state of the victim's fear, a jury could therefore find the defendant committed only the lesser offense of attempted criminal threat. (*Ibid.*)

B. *Analysis*

We conclude there was enough evidence to show C.T. experienced sustained fear during the incident, which lasted at least 10 minutes, which we know from the timing of the 911 calls, from the time when Thurnan threatened C.T. until police arrived. Under the case law cited above, fear lasting one minute has been held to be sustained. It follows that the longer time the threat here lasted is also sustained and not fleeting. C.T. testified that despite her fear, her domestic violence experience taught her not to leave a threat unaddressed. She said she pursued Thurnan to resolve the matter immediately, while people were present who could intervene, rather than leaving herself more vulnerable to his threat during the night while she slept. We conclude that C.T.'s subjective claim that she was "scared to death" was reasonably objective under the circumstances. Thurnan had shoved her to the ground and, even after she used pepper spray on him, he threatened to kill her, toppled a cart he thought was hers, and forcefully threw oranges and rocks at her.

Thurnan's arguments are unavailing. First, the fact that C.T. followed Thurnan does not indicate an absence of sustained fear. No basis exists for concluding that her only options in the face of his attacks were to be paralyzed by fear or to retreat. In fact, the jury reasonably could have believed C.T.'s testimony that she purposefully tried to control her fear so as to resolve the matter and avoid continued fear during the night. Second, it is of no moment that to some witnesses C.T. did not appear afraid because different people respond to threats and attacks differently. As stated, C.T.'s experiences taught her to respond to fear as she did. Third, C.T.'s size and physical appearance of

strength are not correlated to an absence of fear; in fact, there is no evidence those things deterred Thurnan from attacking her or helped her deflect his attacks. To the contrary, the evidence was that C.T. relied on her words to try to calm him down so that he would realize the harm he had caused her. As the totality of the circumstances shows, there is no substantial evidence from which a rational trier of fact could conclude that Thurnan committed the lesser offense and that he is not guilty of the greater offense. (*People v. Williams* (2015) 61 Cal.4th 1244, 1263.) Accordingly, there was no basis for the trial court to instruct the jury regarding the lesser included offense of attempted threat. (*People v. Waidla, supra,* 22 Cal.4th at p. 733.)

II.

Thurnan contends the count 1 assault with a deadly weapon conviction must be modified to simple assault because insufficient evidence showed that the rock he threw at C.T. was a deadly weapon. He contends that a rock is not an inherently dangerous weapon; therefore, the prosecutor was required to prove it was used in a way likely to inflict great bodily injury or death, but the prosecutor failed to do so.

A. *Applicable Law*

Under the substantial evidence standard of review, this court reviews the entire record in the light most favorable to the judgment to determine whether it contains " ' "evidence that is reasonable, credible, and of solid value, from which a rational trier of fact could find [the elements of the crime] beyond a reasonable doubt." ' " (*In re George T., supra,* 33 Cal.4th at pp. 630-631; see also *People v. Harris* (2013) 57 Cal.4th 804, 849; *People v. Lee* (2011) 51 Cal.4th 620, 632.) We presume in support of the judgment

the existence of every fact the jury could reasonably deduce from the evidence. (*People v. Thompson* (2010) 49 Cal.4th 79, 113.) " 'Conflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.] We resolve neither credibility issues nor evidentiary conflicts; we look for substantial evidence.' " (*People v. Lee*, at p. 632.) " ' " 'If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also be reasonably reconciled with a contrary finding does not warrant a reversal of the judgment.' " ' " (*In re George T.*, at pp. 630-631.) The standard applies whether direct or circumstantial evidence is involved. (*People v. Thompson*, at p. 113.)

In *People v. Aguilar* (1997) 16 Cal.4th 1023, 1026 (*Aguilar*), the California Supreme Court addressed whether hands and feet can constitute deadly weapons under section 245. In doing so, the court stated: "As used in section 245, subdivision (a)(1), a 'deadly weapon' is 'any object, instrument, or weapon which is used in such a manner as to be capable of producing and likely to produce, death or great bodily injury.' " (*Aguilar*, at pp. 1028-1029.) Although "[s]ome few objects, such as dirks and blackjacks, have been held to be deadly weapons as a matter of law . . . Other objects, while not deadly per se, may be used, under certain circumstances, in a manner likely to produce death or great bodily injury. In determining whether an object not inherently deadly or dangerous is used as such, the trier of fact may consider the nature of the object, the

manner in which it is used, and all other facts relevant to the issue." (*Id.* at p. 1029; accord, *In re B.M.* (2018) 6 Cal.5th 528, 547.)

B. *Analysis*

A rock is not an inherently deadly weapon as a matter of law. (*Aguilar, supra,* 16 Cal.4th 1023; accord, *People v. White* (1963) 212 Cal.App.2d 464, 465.) Therefore, to prove this charge, the prosecutor was required to show that Thurnan used the rock in such a manner that was likely to cause death or great bodily injury. We conclude the prosecutor did so by adducing evidence from three witnesses that Thurnan assumed a baseball pitcher's stance and forcefully threw the rocks at C.T. The jury could reasonably conclude that such force was aimed at causing great bodily injury. And, in fact, C.T.'s arm bled and became swollen. She required medical attention at the scene of the incident, and two days later she went to the emergency room when her injury worsened. The totality of this evidence is sufficient to support Thurnan's count 1 conviction.

III.

Thurnan contends his assault with a deadly weapon conviction and the enhancement for personal use of a deadly or dangerous weapon must be reversed because the trial court's jury instruction erroneously allowed the jury to find that a rock is an inherently deadly or dangerous weapon. He points out the prosecutor "made at least two statements in closing argument that suggested that a rock of sufficient size was an inherently deadly weapon: 'Rocks are deadly weapons,' and 'We know that rocks can be deadly weapons if they're big enough . . . .' . . . Other portions of the prosecutor's argument addressed the manner in which Thurnan threw the rock and the extent of

[C.T.'s] injury, but one or more jurors could well have relied on the statements quoted above to find that the rock was inherently deadly." Because we address the matter on the merits, we need not address his alternative claim that his trial counsel rendered ineffective assistance of counsel.

A. *Applicable Law*

Thurnan relies on *People v. Aledamat* (2018) 20 Cal.App.5th 1149 (*Aledamat*), review granted in S248105 (July 5, 2018). We address the Court of Appeal's reasoning in *Aledamat* because we agree with part of it. (See Cal. Rules of Court, rule 8.1115(e)(1) ["Pending review and filing of the Supreme Court's opinion, unless otherwise ordered by the Supreme Court . . . , a published opinion of a Court of Appeal in the matter has no binding or precedential effect, and may be cited for potentially persuasive value only"].) In *Aledamat*, the defendant was convicted of assault with a deadly weapon (§ 245, subd. (a)(1)) with personal use of a deadly weapon (§ 12022, subd. (b)(1)) based on evidence that he "pulled a box cutter out of his pocket and extended the blade; from three or four feet away, defendant thrust the blade at the [victim] at waist level, saying, 'I'll kill you.' " (*Aledamat, supra*, 20 Cal.App.5th at p. 1152.)

In *Aledamat*, as here, the trial court instructed the jury that a "deadly weapon" was defined as " 'any object, instrument, or weapon that is inherently deadly or one that is used in such a way that it is capable of causing or likely to cause death or great bodily

injury.' "[3] (*Aledamat, supra*, 20 Cal.App.5th at p. 1152.) The Court of Appeal held that the trial court erred in giving a jury instruction referring to "an inherently dangerous [weapon]," because it was inapplicable to the box cutter used by the defendant. (*Id.* at p. 1153.)

The parties do not dispute that the inclusion of language regarding an "inherently deadly weapon" in CALCRIM No. 3145 was instructional error. Instead, they disagree on whether the error was prejudicial. As we stated in *People v. Stutelberg* (2018) 29 Cal.App.5th 314, "That narrow question turns on a two-step inquiry: (1) whether the error was factual error or legal error; and (2) what prejudice standard applies. [¶] As we explain, the instructional error in this case is legal in nature, and we therefore employ the traditional *Chapman*[*v. California* (1967) 386 U.S. 18] standard to evaluate prejudice." (*Stutelberg*, at p. 318.)

A legal error is an incorrect statement of law, whereas a factual error is an otherwise valid legal theory that is not supported by the facts or evidence in a case. (*People v. Guiton* (1993) 4 Cal.4th 1116, 1125 (*Guiton*).) Between the two, legal error requires a more stringent standard for prejudice, for jurors are presumed to be less able to

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3 Here, the court instructed the jury with CALCRIM No. 875 that "a deadly weapon other than a firearm is any object, instrument, or weapon that is inherently deadly or one that is used in such a way that it is capable of causing and likely to cause death or great bodily injury." As to the personal use enhancement, the court instructed the jury with CALCRIM No. 3145 that if it found Thurnan guilty of the crimes charged in counts 1 and 3, then it must decide "whether for each crime the People have proved the additional allegation that the defendant personally used a deadly or dangerous weapon during the commission of that crime."

identify and ignore an incorrect statement of law due to their lack of formal legal training. (*Guiton*, at p. 1125, quoting *Griffin v. United States* (1991) 502 U.S. 46, 59.) Factual errors, on the other hand, are less likely to be prejudicial because jurors are generally able to evaluate the facts of a case and ignore factually inapplicable theories. (*Guiton*, at p. 1125, quoting *Griffin*, at p. 59.)

B. *Analysis*

The People argue the error here was factual because the jury was simply given otherwise correct instructions about a legal theory that was inapplicable to the facts of the case. In other words, because a rock is not inherently dangerous, the jury was presented with a factually inapplicable theory even though the instruction may have been a correct statement of law in the abstract.

We disagree. An "inherently deadly or dangerous" weapon is a term of art describing objects that are deadly or dangerous in "the ordinary use for which they are designed," that is, weapons that have no practical nondeadly purpose. (*People v. Perez* (2018) 4 Cal.5th 1055, 1065.) But the jurors were never provided with this definition, and they could reasonably classify a rock as inherently dangerous based on the common understanding of the term. This amounts to legal, rather than factual, error.

However, unlike in *Aledamat, supra,* 20 Cal.App.5th 1149, the record here shows that the jury relied on the legally valid theory that defendant used a rock in such a way as to be capable of causing and likely to cause great bodily injury. As in *Aguilar, supra,* 16 Cal.4th 1023, 1037, we conclude that when the prosecutor said in passing in closing argument that stones are deadly weapons, she misspoke. The thrust of the prosecutor's

arguments, as discussed above, was that the way in which Thurnan used the rock, like a baseball player, caused it to become a deadly weapon likely to produce great bodily injury. The prosecutor's statements in their totality did not direct the jury to conclude the rock was inherently deadly by default; rather, they point to ample grounds for the jury to infer that Thurnan used "full force" to hit C.T. in a manner likely to cause or causing injury. Had the jury been provided only with the "deadly or dangerous as used" theory and not the inapplicable "inherently deadly weapon" theory, there is no reasonable probability it would have rejected the deadly weapon enhancement on count 1. Therefore, the instructional error was harmless beyond a reasonable doubt.

IV. *Presentence Custody Credits*

The People concede, and we agree, Thurnan is entitled to additional days of presentence custody credit. Thurnan was in custody from March 8, 2017, until he was sentenced on August 11, 2017, which amounts to more than the 147 actual days and 146 conduct credits the court erroneously awarded him. Under section 4019, subdivision (f), he was entitled to accrue two days of conduct credit for every two days of actual custody. We accordingly direct the court to recalculate Thurnan's presentence custody credits and amend the abstract of judgment.

V. *Sentencing*

Thurnan contends we should remand this matter to the trial court to exercise its discretion to strike the five-year sentence imposed for the serious felony strike prior under section 667, subdivision (a) because during the pendency of this appeal, the Legislature passed a law amending section 1385 giving the court such discretion.

On September 30, 2018, the Governor signed S.B. 1393 which, effective January 1, 2019, amends sections 667 subdivision (a) and 1385 subdivision (b) to allow a court to exercise its discretion to strike or dismiss a prior serious felony conviction for sentencing purposes. (Stats. 2018, ch. 1013, §§ 1-2.) Under the former versions of these statutes, the court was required to impose a five-year consecutive term for "any person convicted of a serious felony who previously has been convicted of a serious felony" (former § 667, subd. (a)), and the court had no discretion "to strike any prior conviction of a serious felony for purposes of enhancement of a sentence under Section 667." (Former § 1385, subd. (b).)

Our colleagues in Division Two recently decided *People v. Garcia* (2018) 28 Cal.App.5th 961, which holds S.B. 1393 is retroactive. In that case, as here, the People conceded that S.B. 1393 applies retroactively. (*Garcia,* at p. 973.) The *Garcia* court ruled that "it is appropriate to infer, as a matter of statutory construction, that the Legislature intended S.B. 1393 to apply to all cases to which it could constitutionally be applied, that is, to all cases not yet final when S.B. 1393 becomes effective on January 1, 2019." (*Garcia,* at p. 973; accord, *In re Estrada* (1965) 63 Cal.2d 740, 744-745 ["If the amendatory statute lessening punishment becomes effective prior to the date the judgment of conviction becomes final then, in our opinion, it, and not the old statute in effect when the prohibited act was committed, applies."]; *People v. Conley* (2016) 63 Cal.4th 646, 657 ["The *Estrada* rule rests on an inference that, in the absence of contrary indications, a legislative body ordinarily intends for ameliorative changes to the criminal law to extend as broadly as possible, distinguishing only as necessary between sentences

that are final and sentences that are not."].) We agree with the *Garcia* court's analysis*;* accordingly, we follow it and remand this matter for resentencing.

DISPOSITION

The sentence is vacated and the matter is remanded to the trial court with directions to permit Keith Omar Thurnan to bring a motion to dismiss the serious felony prior conviction (section 667, subdivision (a)(1)) in light of S.B. 1393, and to exercise its discretion as may be appropriate. If the prior conviction is dismissed the court shall resentence Thurnan accordingly. If the prior conviction is not dismissed the previous sentence shall be reinstated. In all other respects, the judgment is affirmed. The trial court is also directed to recalculate Thurnan's custody credits consistent with this opinion, prepare an amended abstract and forward a certified copy to the Department of Corrections and Rehabilitation.

O'ROURKE, J.

WE CONCUR:

BENKE, Acting P. J.

IRION, J.